SUBJECT INDEX

Page

I.

Statement of Issues 1

II.

Statement of the Case 1

III.

Reasons for Denying Writ 4

IV.

Conclusion 8

TABLE OF AUTHORITIES CITED

Cases	Page
Avco Corp. v. Aero Lodge 735, IAM, 390 U.S. 557	4, 5
Brotherhood of Railway Trainmen v. Chicago River & Indiana Railway Co., 353 U.S. 30	7
Day-Brite Lighting Division v. IBEW, ... F. 2d ..... (D.C. No. Miss. August 25, 1969)	6
Drake Bakeries, Inc. v. American Bakery & Confectionary Workers Int'l. Local 50, 370 U.S. 254	6
General Electric Co. v. Local Union 191, 413 F. 2d 964	5
Sinclair Refining Co. v. Atkinson, 370 U.S. 195	1, 3, 4, 7, 8

Statutes	
Labor-Management Relations Act, Sec. 301	7
Norris-LaGuardia Act, Sec. 4	1, 4, 5, 6, 8
United States Code, Title 39, Sec. 104	4

IN THE

Supreme Court of the United States

October Term, 1969
No. .....

THE BOYS MARKETS, INC.,

Petitioner,

vs.

RETAIL CLERKS UNION, LOCAL 770,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

I.

Statement of Issues.

1. Whether Section 4 of the Norris-LaGuardia Act prohibits the Federal Courts from enjoining peaceful picketing activity in a labor dispute notwithstanding the existence of a "no strike" clause in a binding labor agreement?

2. Whether the decision in *Sinclair Refining Co. v. Atkinson*, 370 U.S. 195 (1962), should be affirmed?

II.

Statement of the Case.

For clarity in this brief, the respondent will be referred to as "the Union" and petitioner as "the Employer" throughout. References to Arabic numerals in

parentheses are to the page numbers of the Transcript of Record, Volume One, (filed with the Circuit Court June 12, 1969).

On February 19, 1969, the Employer filed a complaint for injunctive relief and for specific performance of an agreement to arbitrate in the Superior Court of the State of California [7-16]. The complaint alleged that there existed between the parties a five (5) year collective bargaining agreement covering the period April 1, 1964, through March 31, 1969, containing, among other covenants, a promise of the Union that it would not engage in any strike, work stoppage or other concerted economic activity for the term of the agreement [8]. The complaint further alleged that on February 18, the Union members employed in the Employer's Cudahy Store objecting to the assignment by the employer of certain work to non-union members, engaged in a strike and work stoppage and picketed the store with signs informing the public that the Union was "on strike" [11].

On the same day, the Superior Court issued a temporary restraining order upon the Employer's request against striking, picketing or other forms of work stoppages pending a hearing on order to show cause to be held March 5, 1969 [17-20].

On February 20, 1969, the Union filed its petition for removal with the District Court [2-5]. On February 25, 1969, the Union filed with the District Court a notice of motion to quash the temporary restraining order on February 19, 1969, by the State Court. Hearing on the motion was set for March 10, 1969 [80].

On March 3, 1969, the Employer filed its motion and application for orders compelling arbitration and enjoining conduct which had been enjoined by the State Court temporary restraining order [81-82]. On March 10, 1969, a hearing was held on both motions. After argument, the District Court directed counsel for the Employer to prepare an order directing that arbitration proceed and granting injunctive relief pending arbitration. The order was filed and entered on March 13, 1969 [106-110].

In granting injunctive relief, the Court specifically enjoined and restrained the Union, pending the outcome of arbitration, from picketing or engaging in strikes or work stoppages or in inducing others to do so [108-110]. The findings of fact and conclusions of law filed the same date [112-120] recite that, based upon the Employer's complaint which was attached to the removal petition and upon the memoranda of points and authorities, irreparable injury would occur to the Employer unless the Union was restrained from engaging "in the strike, picketing and work stoppage. . . ." [119]. The Court concluded as a matter of law that the injunction "must be granted," [120] and thereafter an appeal was taken.

The Court of Appeals for the Ninth Circuit on September 26, 1969 reversed, holding that this Court's decision in *Sinclair Refining Co. v. Atkinson,* 370 U.S. 195, was "nearly on all fours with the instant case," and that it was "bound by the holding of *Sinclair.*" (.... F. 2d ....). Reversing the judgment of the District Court, it quashed the injunction and remanded the case for further proceedings.

III.

Reasons for Denying Writ.

1. A re-examination of the Court's decision in *Sinclair Refining Co. v. Atkinson, supra,* is not required by the Court's recent decision in *Avco Corp. v. Aero Lodge 735, IAM,* 390 U.S. 557. The United States Supreme Court has, in its decisions in *Sinclair Refining Co. v. Atkinson,* 370 U.S. 195 (1962), and *Avco Corp. v. Aero Lodge 735,* 390 U.S. 557 (1968), clearly held that Section 4 of the Norris-LaGuardia Act, 39 U.S.C. §104, prohibits the issuance of an injunction against work stoppages and picketing in a labor dispute and that—whether or not State Courts are free to issue such injunctions—upon the filing of a proper petition for removal, subject matter jurisdiction may be transferred from the State Court to the Federal Courts for all purposes. The Supreme Court in the *Avco* decision, *supra,* clarified the important question of whether or not the Federal District Courts were deprived of removal jurisdiction where, in a labor dispute, injunctive relief was sought by an Employer in a State Court. The Court held that an action based upon the violation of a no-strike clause of a collective bargaining agreement was a claim arising under the laws of the United States within the original jurisdiction of the Federal District Courts and, therefore, removable from the State Courts (390 U.S. 557). The right of removal is not abrogated by the collateral statute, Section 4 of the Norris-LaGuardia Act, since Section 4 deprives Federal Courts of equity jurisdiction and not original jurisdiction. That is, Section 4 merely deprives the Federal Courts of the authority to issue an injunction in labor disputes; it does not deprive them of subject matter jurisdiction

over labor disputes in general. In *Avco, supra,* the Supreme Court repudiated the notion that a "State created right" existed throughout the policy of national labor law.

The Supreme Court in *Avco, supra,* stated that it "is not clear" whether the Federal District Court, after removal, dissolved the State Court injunction "because it felt that action was required by *Sinclair* . . . or because of its equity powers or both. . . ." [390 U.S. 557, 561 N. 4 (1968)]. The Court may be here suggesting that, in addition to Section 4, there may be other grounds for dissolution of the injunction under the basic equity powers possessed by the District Court. This language should not be construed to empower the Court to do that under its basic equity powers which it cannot do in contravention of the statute. The object of Federal question jurisdiction, whether original or on removal, is to assure the opportunity for adjudication of a Federal right in a Federal Court. To determine a Federal right differently in one case than in another would totally defeat the object. In *General Electric Co. v. Local Union 191,* 413 F. 2d 964 (5th Cir. 1969), the Court of Appeals in dissolving a State Court injunction under similar circumstances held:

> "We are of the view that the District Court did not err in dissolving the injunction, not because either *Sinclair, supra,* or *Avco, supra,* explicitly dictates that result, but because, in our view, once this case was removed, a failure to dissolve the State Court injunction would have been tantamount to issuance of that same injunction by the Federal District Court, which, as we have just noted, would be proscribed by the Norris-LaGuardia Act under the *Sinclair* decision." (413 F. 2d 964, 966).

For a similar holding, see *Day-Brite Lighting Division v. IBEW*, ... F. 2d ....., (D.C. No. Miss. August 25, 1969).

2. Under the *quid pro quo* doctrine, the Employer promises to arbitrate in exchange for the employee's promise not to strike. Under this doctrine, injunction is not an exclusive remedy. The flexibility of this doctrine was alluded to in *Drake Bakeries, Inc. v. American Bakery & Confectionary Workers Int'l. Local 50*, 370 U.S. 254 (1962), wherein the Supreme Court held:

> "We do not understand the opinions in *Textile Workers Union v. Lincoln Mills*, 353 U.S. 448, 455, or *United Steelworkers v. American Mfg. Co.*, 363 U.S. 564, 567, to enunciate a flat and general rule that these two clauses are properly to be regarded as exact counterweights in every industrial setting. . . ." (370 U.S. 254, 261 N.7).

The Employer is free under most labor agreements to discharge or discipline the strikers and their leaders. In addition, suit may be brought against the Union to recover the damages caused by an illegal strike which it authorized or for which it is otherwise responsible. Thus, the injunction is not the only efficacious and practical remedy for a strike in defiance of a no-strike provision. Unions are as fearful as are other institutions of the risk of a judgment for damages which may empty or deplete their treasuries.

3. The legislative history of Section 4 of the Norris-LaGuardia Act should restrain any judicial tampering with the effect and plain meaning of the Norris-LaGuardia Act. Whenever Congress has wished to relax the application of Norris-LaGuardia, it has expressed

its intention explictly. Section 301 of the LMRA contains no specific repeal; on the contrary, its legislative history shows clearly that Congress considered and rejected the possibility of making Norris-LaGuardia inapplicable to §301 actions. Each year that passes since *Sinclair* was decided in 1962 increasingly confirms the validity of the judgment. Congress has not been persuaded to change the *Sinclair* rule. It has not acted on the bills designed to modify it. The United States Supreme Court in *Sinclair* expressly referred the issue to Congress. This Court should now respect the will of Congress to leave well enough alone. *Sinclair* should not be subject to judicial reconsideration, let alone reversal.

4. The argument that because the Railway Labor Act was considered with the Norris-LaGuardia Act in *Brotherhood of Railway Trainmen v. Chicago River & Indiana Railway Co.*, 353 U.S. 30, (and other cases) then Section 301 of the Labor-Management Relations Act should also be considered with the Norris-LaGuardia Act is not supported by case law. The Supreme Court clearly held in *Brotherhood Railway Trainmen v. Chicago River & Indiana Railway Co.* (*supra*) that:

> "The relationship of labor and management in the railroad industry has developed on a pattern different from other industries. The fundamental premises and principles of the Railway Labor Act are not the same as those which form the basis of the National Labor Relations Act, 49 Stat. 449, as amended, 29 U.S.C. 151 *et seq.* It is one of those differences which underlies the controversy in this case." (353 U.S. 30, 31 N.2).

The Brotherhood contended that the Norris-LaGuardia ban should apply in railroad labor cases in the same manner as it applies to other cases. In distinguishing the accommodation made between the Railroad Labor Act and Norris-LaGuardia, the Court held:

> "The Brotherhood has cited several cases in which it has been held that the Norris-LaGuardia Act's ban on Federal injunctions is not lifted because the conduct of the Union is unlawful under some other statute. We believe that these are inapposite to this case. None involved the need to accommodate the statutes, when both were adopted as a part of a pattern of labor legislation." (353 U.S. 30, 42).

IV.

Conclusion.

There really can be no question of interpretation of Section 4 of the Norris-LaGuardia Act. A strike injunction is squarely within its statutory proscription. While there may be reason for legislative action, there is no justification for judicial reconsideration of *Sinclair*. Judicial legislation is an evil that should be avoided by all Courts. For the foregoing reasons, the respondent submits that the petition for a writ of certiorari should be denied.

Dated: November 20, 1969.

Respectfully submitted,

ARNOLD, SMITH & SCHWARTZ,
KENNETH M. SCHWARTZ, ESQ.,
ROBERT M. DOHRMANN, ESQ.,
Attorneys for Respondent.